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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of DENNIS and NANCY SCHEPPERS.	
DENNIS SCHEPPERS, Appellant, v. NANCY SCHEPPERS, Respondent.	E025054 (Super.Ct.No. SBFL39502) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Kathleen Bryan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Dennis Scheppers in pro. per., for Appellant.

Janet Stouder Brandon for Respondent.

Downey, Brand, Seymour & Rohwer, Mary J. Martinelli and Frank E. Dougherty for Association of Certified Family Law Specialists as Amicus Curiae upon the request of the Court of Appeal.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts B, C and D.

A father of minor children appeals from an order modifying his child-support obligation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dennis Scheppers and Nancy Scheppers married in 1974. The marriage produced six children: Micah, Matthew, Amber, Joseph, Amanda, and Jennifer. When their marriage was dissolved in 1987, all six children were minors.

In July of 1998, the mother applied for and obtained an order to show cause seeking, inter alia, a modification of child support for the two minor children living with her. Following an evidentiary hearing, the trial court set the father's child support obligation at $2,991 per month. The father appeals.

CONTENTIONS

In a somewhat different order, the father contends that the trial court erred in four respects: by failing to include in the mother's gross income sums she received as the beneficiary of a life insurance policy; by failing to impute any income to the mother based upon her ability to earn; by basing the father's income upon an unreasonable work schedule; and by depriving the father of due process and equal protection of the law.

ANALYSIS

A. THE TRIAL COURT DID NOT ERR BY EXCLUDING THE LIFE INSURANCE PROCEEDS FROM THE MOTHER'S INCOME.

Micah, the eldest child, committed suicide in February of 1998, when he was 22 years old. In February or March of that year, the mother received $200,568 as the beneficiary of an insurance policy insuring Micah's life. The father argued that those life

insurance proceeds should be counted as income to the mother in 1998. The trial court decided that the insurance proceeds were an asset, not income. However, the court did include as income the interest that could be earned from the investment of that corpus. Finding that a reasonable rate of return was ten percent, the court deemed the mother to receive $1,666 interest income per month. On appeal, the father contends that the trial court erred by not treating the corpus of the life insurance death benefit as income.

The computation of the extent of a parent's obligation to support his or her child begins with the parent's annual gross income. "The annual gross income of each parent means income from whatever source derived, except as specified in subdivision (c) and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article. [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] (3) In the discretion of the court, employee benefits or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts." (Fam. Code, § 4058, subd. (a).)[1] The only statutory exceptions are (1) "income derived from child support payments actually received," (2)

[1] Unless specified otherwise, all further section references are to this code.

"income derived from any public assistance program, eligibility for which is based on a determination of need," and (3) "[c]hild support received by a party for children from another relationship . . . ." (*Id*., subd. (c).)

Significantly, life insurance proceeds are not among the types of payments specifically included within the scope of the statutory definition. (§ 4058, subd. (a).) Nor are they specifically excluded. (*Id*., subd. (c).) The Legislature having failed to resolve the issue expressly, it falls to us to determine whether life insurance proceeds fall within the scope of the statutory definition of gross income.

Although the statutory definition is very broad (*In re Marriage of Rocha* (1998) 68 Cal.App.4th 514, 516; *Stewart v. Gomez* (1996) 47 Cal.App.4th 1748, 1753, 1755), it is not unlimited. It does not extend to every type of payment or economic benefit received by a parent. For instance, in addition to the statutory exceptions (§ 4058, subd. (c)), we have previously held that the proceeds of student loans are not income (*In re Marriage of Rocha, supra,* 68 Cal.App.4th at pp. 516-518). Similarly, we conclude that life insurance benefits are not within the statutory definition of income, for the following reasons.

First, it is established that gifts, whether inter vivos (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 529) or testamentary (*County of Kern v. Castle* (1999) 75 Cal.App.4th 1442, 1448-1454), are not within the scope of the statutory definition of income. It is impossible to draw a rational distinction between a gift made by designating the donee as the beneficiary of a will and a gift made by designating the donee as the beneficiary of a life insurance policy.

Second, section 4058 refers to a variety of specific types of insurance benefits, including worker's compensation insurance, unemployment insurance, and disability insurance. (*Id*., subd. (a).) Clearly, the general category of insurance proceeds was before the Legislature. Had it intended to include life insurance proceeds, it presumably would have done so. Under those circumstances, it is unlikely that the omission of those benefits was unintentional.

Third, life insurance death benefits are not income under the federal Internal Revenue Code: "Except as otherwise provided in paragraph (2), subsection (d), and subsection (f), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured." (26 U.S.C. § 101(a)(1).) Although federal law is not conclusive on the interpretation of section 4058, it is persuasive, because "[t]he operative language in subdivision (a) [of section 4058], i.e., 'annual gross income . . . means income from whatever source derived,' was lifted straight from the definition of income in section 61 of the Internal Revenue Code." (*In re Marriage of Schulze, supra,* 60 Cal.App.4th at p. 529.)

Fourth, life insurance proceeds do not meet the common-law definition of income. The traditional understanding of "income" is the gain or recurrent benefit that is derived from labor, business, or property (*McCulloch v. Franchise Tax Bd*. (1964) 61 Cal.2d 186, 192) or from any other investment of capital (*Wells v. Wells* (1944) 64 Cal.App.2d 113, 115-116). Almost every type of income specified by section 4058, subdivision (a), is either a return from labor, business, or property (such as wages, dividends, and rents) or

else a substitute for that return (such as disability insurance benefits). Not only is a lump-sum life insurance death benefit not "recurrent," it is not derived from labor, business, or property in the same manner as the statutory examples.[2]

Fifth, including a lump-sum life insurance death benefit as income is impractical. If the mother were deemed to have received $200,000 in income in the year in which the insurance proceeds were paid, what would happen the following year when her income would be $200,000 less? Would she be entitled to immediately move for an increase in child support? And if so, what is the sense in treating the insurance proceeds as income in the first place?

Finally, the only other court that we have found that has considered the matter has concluded that life insurance death benefits are not income. The Louisiana Court of Appeal, applying a statutory definition identical to section 4058 in all material respects, has held that life insurance proceeds should not be included as gross income for the purpose of determining the extent of the beneficiary's child support obligation. (*Guy v. Guy* (La.Ct.App. 1992) 600 So.2d 771, 772.) The court's reason is persuasive: "Income is the key factor in our system, not capital or net worth. As stated in *French* [*v. Wolf*

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[2] The amicus curiae raises the possibility that insurance policy death benefits would be analogous to a return on an investment if the policy premiums were paid by the beneficiary. However, we need not decide whether the proceeds would be income under those circumstances, because there is no evidence in the record that the mother paid the premiums for the policy in question. To the contrary, her counsel stated without contradiction in open court that the mother had received the life insurance proceeds "as a gift from her son," suggesting that the decedent paid his own premiums. Her trial brief is similar ("posthumous gift"). Because the decedent was in the United States Marine

[footnote continued on next page]

(1935) 181 La. 733, 737-738 [160 So. 396, 397]], these concepts are distinctly different. Proceeds paid on a life insurance policy constitute capital and not income." (600 So.2d at p. 773.)

For all these reasons, we hold that life insurance death benefits are not within the scope of gross income as defined in section 4058.

The authorities that the father relies upon for the opposite conclusion are not persuasive. For instance, he notes that in *County of Contra Costa v. Lemon* (1988) 205 Cal.App.3d 683, at pages 688-689, the court held that under the facts of that case, lottery winnings were properly included as income. But as the return on the investment of capital, gambling winnings fall within the traditional concept of income. (*Wells v. Wells, supra,* 64 Cal.App.2d at pp. 115-116.) Similarly, gambling winnings constitute taxable income under both federal and California law. (26 U.S.C. § 74(a) [prizes are income]; *id*., § 165(d) [gambling losses are deductible from income]; Rev. & Tax. Code, §§ 17071, 17081 [adopting federal provisions]; *Campodonico v. United States* (9th Cir. 1955) 222 F.2d 310, 314 [gambling winnings constitute income].) Therefore, the conclusion that gambling winnings are income under section 4058 does not support the proposition that life insurance death benefits should also be considered to be income.

Moreover, even if lottery winnings did not fall within the general definition of income and were not treated as income under the tax laws, the rule of *County of Contra*

[footnote continued from previous page]
Corps at the time of his death, the evidence suggests that the policy was obtained by the decedent through his military service.

Costa v. Lemon, supra, 205 Cal.App.3d 683, has been limited to cases in which a county is seeking to recover reimbursement for public support paid under the Aid to Families with Dependent Children program or when failing to consider the lottery winnings would lead to a support order that is less than the minimum AFDC grant. (*County of Kern v. Castle, supra,* 75 Cal.App.4th at pp. 1450-1451.) Because there is no evidence that the mother here has ever collected AFDC payments, the rule of *Lemon* has no application. The federal cases cited by the father are similarly distinguishable because they both deal with the effect of certain types of payments on the recipient's eligibility for AFDC benefits. (*Lukhard v. Reed* (1987) 481 U.S. 368 [95 L.Ed.2d 328] [personal injury awards]; *LaMadrid v. Hegstrom* (9th Cir. 1987) 830 F.2d 1524 [personal injury awards, life insurance proceeds, worker's disability compensation, crime victim compensation].)

The trial court did not err by excluding from the calculation of the mother's gross income the principal sum that she received as a death benefit under her son's life insurance policy.

B. THE TRIAL COURT DID NOT ERR BY REFUSING TO IMPUTE INCOME TO THE MOTHER.

Throughout the term of the marriage, the mother was a homemaker. She had deferred her own college education so that the family could move to Mexico where the father was attending medical school. As part of the dissolution, the father agreed to finance the mother's college and post-graduate education.

The mother graduated from law school in June of 1997. She took the bar examination in July of 1997 but failed it. Because of her son's suicide, she did not take it again until February of 1999. The results of that second examination had not been released at the time of the hearing.

The father argued that, even without being admitted to the bar, the mother could have obtained employment as a paralegal, earning $40,000 to $80,000 per year. Her failure to do so was "a lifestyle choice" on her part. He urged the trial court to impute employment income to her pursuant to section 4058, subdivision (b), which provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

The trial court found "that the emotional effect to mother and the children in her custody which occurred after the suicide of the parties' son Micah in early 1998 precluded her from having any reasonable ability to earn significant income in 1998 or the first part of 1999 until she took the California Bar Exam. . . . Commencing April 1, 1999, the court will impute income of $1,500 per month to mother as stipulated by her counsel. While father argued that she has an ability to earn $40,000 per year doing paralegal work, he offered no evidence such as newspaper ads or employment offerings to support what a paralegal earns in this area."

On appeal, the father contends that the trial court's finding was erroneous because the mother "has provided no credible evidence . . . of disability . . . ." He is mistaken. Substantial evidence was admitted to support that finding.

In order to establish her emotional inability to work during the relevant period of time, the mother presented the expert testimony of Joyce Reiswig, a marriage, family and child counselor. Reiswig testified that she first saw the mother as a patient on February 24, 1998, 17 days after her son had committed suicide. According to Reiswig, the mother was in deep grief and overwhelmed by feelings of loss, guilt and remorse. In the first part of July of 1998, Reiswig conducted several clinical tests and found that the mother was suffering from severe depression. Reiswig continued to see the mother regularly until the end of August of 1998 and had a final session with her in October of 1998.

Reiswig concluded that the mother was incapable of sitting for either the February 1998 or the July 1998 bar examinations. She further concluded that the mother was unable to seek and hold employment between February and August of 1998. In reaching those conclusions, Reiswig observed that the mother's concentration was poor, she was crying a lot, and her short-term memory was not good. She also relied upon the mother's unsuccessful attempt to hold a job at that time.

In October of 1998, Reiswig observed that the mother was still depressed. Given the mother's emotional state and her decision to study for the February 1999 bar examination, Reiswig doubted that the mother could have been an adequate mother for her children, worked, and studied for the bar at the same time.

Reiswig also concluded that it was not in the best interest of the children for the mother to be away from home. She testified that she first treated all of the children as a group and then had an individual session with each child. The mother was concerned that Joe might be somewhat suicidal. Reiswig also clinically tested Amber and concluded that

she was severely depressed. In Reiswig's expert opinion, children need additional psychological support from their parents at the time of crisis.

The father acknowledges this evidence but dismisses it as having come in the form of expert testimony that should not have been admitted. Therefore, his argument that the trial court's finding is not supported by substantial evidence depends upon his contention that the trial court erred by admitting Reiswig's testimony.

The father's sole argument with respect to this issue is that Reiswig was statutorily unqualified to render an opinion as to whether the mother was incapable of being employed due to her emotional disability. He relies entirely upon that portion of Labor Code section 3209.8 that provides: "Nothing in this section shall be construed to authorize marriage, family, and child counselors or clinical social workers to determine disability for the purposes of Article 3 (commencing with Section 4650) of Chapter 2 of Part 2."

We do not consider this argument on the merits. Although the father objected to Reiswig's testimony, he did not do so on the basis that she was unqualified to render the expert opinions to which she was testifying. Having failed to challenge the expert's qualifications in the trial court, he is precluded from raising that issue for the first time on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 194.)

Even had the issue not been waived, we would have rejected it. Labor Code section 3209.8 merely precludes licensed marriage and family counselors from determining whether a person is disabled for the purpose of workers' compensation laws.

Nothing in that section limits the ability of those counselors to give expert testimony in other situations.

In summary, the trial court did not abuse its discretion in admitting Reiswig's expert opinions regarding the mother's inability to work prior to April of 1999. Because that evidence amply supports the trial court's factual finding that the mother could not work during that period, the trial court did not err by declining to impute employment income to the mother during that period.

C. THE TRIAL COURT DID NOT ERR BY CALCULATING THE FATHER'S GROSS INCOME ON THE BASIS OF BOTH OF HIS JOBS.

At trial, the father argued that he was being forced to work two jobs, for a total of 78 hours per week, in order to pay child support. He asked the court to include only his primary, 48-hour-per-week job when calculating his gross income. Rejecting the father's plea, the trial court calculated his income on the basis of both jobs. It found, inter alia, that the father was not forced by his child-support obligations to work long hours. Instead, the father voluntarily works those hours in order to maintain his chosen standard of living, which includes a $500,000 house and monthly expenses of over $12,000 (compared to monthly income from his primary job of only $9,300).

The father does not contest those findings or the sufficiency of the evidence to support them. Instead, he insists that the trial court was "required" to consider only his primary job.

He is mistaken. When a parent voluntarily chooses to work overtime, there is no reason to exclude the overtime pay from the parent's income. (*County of Placer v.*

Andrade (1997) 55 Cal.App.4th 1393, 1397.) By the same token, when a parent voluntarily chooses to work two jobs, there is no reason to exclude the wages from the second job from that parent's gross income.

In re Marriage of Simpson (1992) 4 Cal.4th 225, the sole authority relied upon by the father, does not mandate a different result. Contrary to his assertion, *Simpson* does not hold that a 40-hour work week is always a reasonable work schedule. Instead, the court found that established employment norms, such as a 40-hour week, are merely factors to be considered when determining whether a parent is required to work an unreasonable number of hours to meet his or her child support obligations. (*Id.,* p. 236.) In some professions, it is reasonable for a person to work more than a standard 40-hour week. (*Ibid*.) The determination of reasonableness of the parent's working schedule should be made on the facts of each particular case. (*Id*., pp. 235-236.)

In short, given the father's voluntary decision to work two jobs, the trial court did not err by including his compensation from both employers when calculating his gross income.

D. THERE IS NO CONSTITUTIONAL ERROR.

In an abbreviated manner and without citation to legal authority, the father argues that the number and nature of the trial court's errors were so pervasive that he was denied his due process rights. He is mistaken. As discussed in detail above, none of the decisions on which he focuses are erroneous. By logical implication, his due process claim based on these alleged errors fails as well. Nevertheless, out of an abundance of

caution, we have carefully reviewed the entire record of the proceedings below. That review demonstrates that the father received a fair trial.

Similarly, he contends that the trial court denied him equal protection of the law by requiring him to work an extraordinary number of hours per week. That claim is also meritless. The trial court did not single out the father for unequal treatment. Instead, his work schedule is the result of his own voluntary choices.

DISPOSITION

The judgment is affirmed. Nancy Scheppers shall recover her costs on appeal.

McKINSTER J.

We concur:

RAMIREZ P.J.

GAUT J.